Filed 10/10/02 Callahan & Gauntlett v. Aetna Casualty & Surety CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CALLAHAN & GAUNTLETT et al., Plaintiffs, Cross-defendants and Respondents, v. AETNA CASUALTY & SURETY COMPANY, Defendant, Cross-complainant and Appellant;	G022774 (Super. Ct. No. 616754) O P I N I O N
WATERCLOUD BED CO., INC., et al., Plaintiffs and Respondents, v. AETNA CASUALTY & SURETY COMPANY, Defendant, Cross-complainant and Appellant.	G023026

Appeal from a judgment and orders of the Superior Court of Orange County, Tully H. Seymour, Judge. Reversed and remanded with directions.

Sedgwick, Detert, Moran & Arnold, Alan J. Friesleben and Todd A. Picker; Peterson, Picker, Chow & Freisleben, and Todd A. Picker, for Defendant, Cross-complainant and Appellant Aetna Casualty and Surety Company.

Hollins & Rice, Byron S. Hollins, Andrea Lynn Rice and Kim A. Hayashi; Hollins & Fields, and Byron S. Hollins, for Plaintiff, Cross-defendant and Respondent David Gauntlett.

Poliquin, Goodspeed, Mulder & Skripko, and Christopher Mulder; Poliquin, Goodspeed & Mulder, and Christopher Mulder, for Plaintiffs, Cross-defendants and Respondents Daniel J. Callahan and Callahan & Gauntlett.

Callahan & Blaine, and Jim P. Mahacek for Plaintiffs and Respondents Callahan & Gauntlett and Richard LaBianco.

* * *

This is the dispute that will not die, and, much to our chagrin, we are not able to drive a stake entirely through its heart even now. The law firm of Callahan & Gauntlett — since deceased — and its successors (collectively C&G) have been fighting with Aetna Casualty and Surety Company (Aetna) since 1988, about whether, and to what extent, Aetna is liable for attorney fees billed by C&G in defending a patent infringement lawsuit filed against Aetna's insureds. The first round took place in the federal district court, but was ultimately dismissed for lack of complete diversity. The second round culminated in our determination that C&G could not force Aetna to arbitrate the reasonableness of its fees under Civil Code section 2860, subdivision (c), until it had proven that Aetna owed a duty to defend the insureds. (*Callahan & Gauntlett v. Industrial Indemnity Company et al.* (Sept. 21, 1992, G009747) [nonpub. opn.].)

In the third round, we concluded Aetna had no duty to defend the insureds in the underlying action. (*Aetna Casualty & Surety Co. v. Superior Court* (1993) 19 Cal.App.4th 320 (*Aetna v. Superior Court).)* However, by that time, the underlying lawsuit against the insureds had already reached its conclusion.

Here in the fourth round, Aetna appeals from a quantum meruit judgment awarding C&G $164,953.19 in fees and costs which were incurred in defending the insureds prior to the issuance of our *Aetna v. Superior Court* opinion. Aetna contends that in light of that opinion, and in the circumstances of this case, it could have no liability to C&G as a matter of law. Aetna also contends the trial court committed reversible error in several other respects, most strikingly by failing to hold a trial on liability issues after a referee submitted findings concerning the reasonable value of the services rendered but not paid for. Aetna also asserts the court erred in summarily adjudicating its cross-complaint for indemnity and contribution after determining that the causes of action initially pled stated no claim, but while declaring its pending motion to amend to be "moot." Finally, Aetna contends the court's award of pre-judgment interest to C&G was improper, because its quantum meruit claim was unliquidated as a matter of law.

We agree with Aetna in most respects. Of course, the court's entry of judgment without actually holding a trial on quantum meruit liability would, in and of itself, compel a reversal of the judgment and a remand of this case to the trial court. However, we need not remand the complaint for such a trial, because we also conclude that under these circumstances, when an insurer offers a conditional defense, the insurer's obligations arise out of the policy and are owed to its insureds – not owed directly to the counsel retained by the insureds. Consequently, the trial court's earlier summary adjudication of all causes of action based upon the insurance policy rights of the insureds, and its rejection of any direct agreement between Aetna and C&G, none of which has been challenged by C&G on appeal, precludes any finding of liability against Aetna as a

matter of law. That conclusion also renders moot the issue of prejudgment interest awarded against Aetna.

By the same token, Aetna's right to seek reimbursement of defense costs already paid to C&G also runs against the insureds, and not directly against C&G itself. Consequently, the determination that Aetna owed no duty to defend the insureds gives it no right to seek reimbursement from C&G for defense costs already paid. However, we still cannot endorse the trial court's dismissal of the cross-complaint, because we also agree with Aetna's contention the trial court erred in disposing of the cross-complaint without considering its pending motion to amend. If the proposed amendment was otherwise proper, it offered two additional and distinct theories of liability against C&G, plus additional allegations against Richard LaBianco, one of the insureds, which were unaffected by the summary adjudication motion. Consequently, the propriety of the proposed amendment should have been considered prior to final adjudication of the cross-complaint. We therefore reverse the judgment and remand this case to the trial court with instructions to consider the merits of Aetna's previously dismissed motion to amend the cross-complaint. To the extent that motion is granted, Aetna can proceed on the cross-complaint.

* * *

Aetna's insureds are Watercloud Bed Company, Inc. and LaBianco. In April of 1987, they were sued by Somma Mattress Company for patent infringement and subsequently tendered the claim to Aetna. Aetna denied the claim and any duty to defend, but agreed to provide a defense subject to its right of reimbursement if it ultimately proved it had no duty to defend. Aetna agreed that Watercloud and LaBianco could continue being represented by C&G, the counsel they had already retained. Unbeknownst to Aetna, however, C&G had agreed to pay a percentage of the fees it earned on the case to the attorneys who had referred Watercloud to the firm.

In cooperation with Industrial Indemnity Company, another insurer for

Watercloud, Aetna agreed to pay up to $182.50 per hour for the more-senior C&G attorneys, but stated those rates would be effective only until January of 1988, when they would be reviewed in conjunction with the enactment of Civil Code section 2860. Aetna also contends that the hourly rates agreed upon were based in part upon C&G's false representations that it had experience in patent litigation. In addition to the arrangements with C&G, Aetna also retained an attorney of its own choosing, with substantial patent litigation experience, to work with C&G on the Somma litigation.

In early 1988, Aetna commenced the initial declaratory relief action, seeking a determination of its obligations to defend and indemnify Watercloud and LaBianco under the terms of its policy. That dispute, in its various incarnations, has matured into this litigation.

The underlying Somma litigation ultimately settled, with no payment to the plaintiff. Aetna never officially withdrew its conditional defense during the pendency of that case, but disputes developed between Aetna and C&G concerning the propriety of C&G's fees, and not all the fees were paid.

The clients assigned their rights to C&G, which sued Aetna for breach of the implied covenant of good faith and fair dealing, breach of contract, intentional and negligent infliction of emotional distress and breach of fiduciary duty, common counts and a declaration that Aetna was liable to indemnify Watercloud for the total amount of fees billed. Aetna answered the complaint, denying liability and asserting affirmative defenses which included laches and unclean hands. Aetna also filed a cross-complaint against C&G and the insureds, as well as Industrial Indemnity, asserting causes of action for indemnity and contribution, and seeking reimbursement of the fees previously paid to C&G. The cross-complaint against Industrial Indemnity was later severed.

After this court issued its 1993 opinion in *Aetna v. Superior Court,* concluding that Aetna's policy afforded no potential coverage for the claims asserted in the underlying Somma litigation, the parties returned to the superior court and filed cross-

motions for summary judgment.

In light of our opinion, the trial court determined in August of 1994, that Aetna had no obligation under the insurance contract to pay for the defense of Watercloud or LaBianco in the Somma litigation. It denied C&G's motion for summary adjudication, and granted summary adjudication in favor of Aetna on all of C&G's causes of action arising out of the insurance contract itself, including those based upon the assignment of rights from the insureds. However, the court refused to grant summary adjudication of C&G's cause of action alleging breach of a separate and independent contract between Aetna and C&G for payment of the fees, or of C&G's common counts. None of those summary adjudications is the subject of a cross-appeal.

In 1996, Aetna again moved for summary judgment, contending that discovery had revealed undisputed facts demonstrating there was no independent agreement entered into between Aetna and C&G that would support liability for the claimed fees and costs. The court expressly found "that there is no agreement on the part of Aetna to pay Callahan & Gauntlett's fees." However, the court denied the motion, concluding there was nonetheless "a triable issue of fact as to whether [C&G] was paid [for] pre-withdrawal services on behalf of Watercloud Bed Company, Inc." Despite its finding that Aetna had "no agreement . . . to pay" C&G's fees, the court inexplicably also denied Aetna's motion for summary adjudication of C&G's 11th cause of action, which specifically alleged liability based upon such an agreement.

At the request of C&G, the court then ordered a reference proceeding to sort out a long accounting of the fees billed by C&G, but not paid by Aetna. The referee issued his report in January of 1997. The report included many factual findings, such as that C&G had misrepresented its qualifications to Aetna, but that Aetna was apparently not actually mislead. It also concluded that C&G over billed the case and suggested a 10 percent discount on the total fees. The hourly rates were also reduced for several lawyers. The final amount found still owing (assuming liability) was $51,183.87 for fees,

and $70,501.38 for costs.

Both sides objected to the report, C&G on the ground that the hours were wrongly added up (rendering the referee's decision incorrect by approximately $400,000), and Aetna on various other grounds relating to the scope of the reference and the allegations underlying its defenses. The referee invited Aetna to examine C&G's calculations of the numbers, and otherwise "preserved" all objections for the trial court's independent review.

After further consultation with the court, the referee issued an amended report. In that report, the referee apparently adopted C&G's version of the number of hours, but then reconsidered his evaluation of the extent to which the fees should be discounted in light of overbilling. He concluded that C&G overbilled by 35 percent, not 10 percent, and consequently still arrived at the same final numbers. He explained in conclusory fashion, that even assuming the truth of the claimed $400,000 in additional hours, he would not change his conclusion about the total amount of fees to be paid. His recommendation still remained $51,183.87 for fees owing, and $70,501.38 for costs owing, for a total of $121,685.25. Remarkable.

C&G then objected to the amended report as well, pointing out that even assuming the 35 percent discount imposed by the referee therein, a simple calculation of the hours spent would result in an award of $164,953.19 in fees owing. Aetna also objected again, pointing out as before that the referee's findings exceeded the scope of the reference proceeding.

Shortly thereafter, the court granted Aetna's motion to dismiss the second amended complaint filed by Watercloud, one of the insureds, and to strike its answer to Aetna's cross-complaint, on the ground that Watercloud was a suspended corporation.

The court scheduled a status conference for July 25, 1997, to consider the parties' arguments relating to the accounting. The date of the status conference was also the hearing date for three summary judgment motions on Aetna's cross-complaint, filed

separately by C&G and its two successors. Approximately a week before that hearing date, Aetna filed its own motion for leave to file an amended cross-complaint. That motion proposed adding claims for reimbursement based upon this court's (much) earlier determination that Aetna had owed no duty of defense to the insureds, and upon allegations of various misrepresentations by C&G. Although Aetna sought an order shortening time for hearing on the motion, or alternatively continuing the motions for summary judgment, so as to allow the motions to be heard together, that request was denied.

On August 11, 1997, the court issued a minute order announcing its rulings from the July 25 hearing. It granted C&G's motions for summary judgment on the cross-complaint, but gave no explanation of its reasons.[1] The order then provides: "Hearing re: Objections to referee's report. Rulings as follows: The Court finds that the value of the legal services rendered by CALLAHAN & GAUNTLETT in the defense of Watercloud, Inc., up to the time of the settlement which were unpaid is the sum of $164,953.19. In addition, there are costs due and owing in the amount of $70,501.38. The total combined amount owed to CALLAHAN & GAUNTLETT is therefore $235,494.57. The court orders judgment . . . in that amount." The minute order then continued: "The Motion re: Leave to file first amended cross-complaint set on August 19, 1997 . . . is therefore **moot** and ordered off calendar."

The court's judgment specifies that the sole basis for liability on the complaint is quantum meruit. It provides, in pertinent part, "this Court finds that on a quantum meruit basis, the value of the unpaid legal services rendered by Callahan& Gauntlett and owed by [Aetna] in the defense of Watercloud Bed Company, Inc. up to the time of the withdrawal of defense by [Aetna] is the sum of $164,953.19."

---

[1] Our record contains no motion filed on behalf of LaBianco, who was also a cross-defendant. Nonetheless, the court's judgment reflects that he was also a moving party and prevailed on the motions.

I

Aetna contends the quantum meruit judgment must be reversed, because the trial court entered the judgment based upon a referee's determination of the reasonable value of the services rendered by C&G, but without holding any trial to determine the basic issue of whether Aetna could be held liable on that equitable theory. We must agree.

As we have alluded to already, this case gives new meaning to the phrase "over-litigated" and the volume of paper generated by the warring factions is astounding. Indeed, even back in 1994, when the parties filed their initial round of summary judgment and summary adjudication motions, the trial judge (the Honorable Donald Smallwood) lamented that "an army of litigators has engaged in the production of a plethora of motions, declarations, exhibits, objections and requests for judicial notice, along with replies and arguments on objections, plus assorted errata and supplemental authority, to a point where the process of an orderly consideration of the issues involved becomes almost unmanageable." We quarrel only with Judge Smallwood's use of the adverb "almost."

Needless to say, the parties never took the hint, the massive flood of paper never abated, and we can only assume that the trial court ultimately lost track of exactly what issues had been properly disposed of. We sympathize.

But, however understandable the circumstances of the error, we cannot overlook the omission of a trial, or some other appropriate dispositive proceeding. And even C&G does not really contend that a proper trial took place. Instead, it suggests that Aetna waived the issue when it opposed C&G's motion in this court to dismiss the appeal and remand the case to the trial court for the limited purpose of correcting the error. We can recognize no such waiver. It was this court, and not Aetna, which denied C&G's motion. If we had determined that the proposed dismissal and remand was procedurally proper and advisable under the circumstances, we would have granted the motion

notwithstanding Aetna's refusal to endorse the idea. Our decision not to do so effected no waiver of Aetna's rights.

In any event, remand of the complaint is unnecessary, because as we shall explain, we agree with Aetna's contention that it could have no direct quantum meruit liability to C&G as a matter of law. That being the sole and specific theory of liability relied upon by the court in the judgment, Aetna is entitled to have judgment entered in its favor on the complaint.

II

As Aetna contends, a quantum meruit recovery is based upon equitable principles and is premised upon the idea that a contract to pay for services rendered at the request of defendant is implied by law in certain circumstances for reasons of justice. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co*. (1996) 41 Cal.App.4th 1410, 1419.) However, quantum meruit cannot be used to avoid the parties' express agreement, so the claim cannot be sustained where an express agreement covering the subject services already exists between the parties. (*Wal-Noon Corp. v. Hill* (1975) 45 Cal.App.3d 605, 613 ["There cannot be a valid, express contract and an implied contract, each embracing the same subject matter, existing at the same time."].) In this case, the trial court found that no such express agreement existed, and neither party challenges that claim.[2]

To prevail on its quantum meruit claim, and obtain recovery from Aetna in the absence of a direct contract, C&G must establish specific facts, including that the

---

[2] C&G does suggest the conclusion that no express contract existed violated the doctrine of issue preclusion, because this court had previously determined, it its first unpublished decision, that "Aetna had agreed to engage C&G." We cannot agree. Our opinion states only that "Watercloud and LaBianco retained Callahan . . . to defend it in the action. [¶] Defense of the lawsuit was tendered to Aetna . . .[which] sent Watercloud a letter agreeing to defend, but reserving its rights to deny coverage, refuse to pay for the defense, and to seek reimbursement from Watercloud in the event a determination was made that its policy did not cover Watercloud's liability. . . . [¶] . . . [I]t was agreed . . .Aetna would pay Callahan $182.50 per hour for its defense of Watecloud." (*Callahan & Gauntlett v. Industrial Indemnity Company et al., supra,* G009747, pp. 2-3.) None of that amounts to a conclusion that Aetna entered into a direct enforceable contract with C&G. Indeed, it explicitly recognizes Aetna's reservation of the right to refuse to pay.

services rendered were of "direct benefit" to Aetna. (*Palmer v. Gregg* (1967) 65 Cal.2d 657, 660.) In *Palmer*, the plaintiff sought a quantum meruit recovery against a decedent's estate arising out of the care she provided to decedent prior to his death. While the Supreme Court agreed she was entitled to recover the value of the services she rendered, it rejected her claim that the expense she incurred for a gardener to maintain her own home for the period she was with the decedent should be allowed as well: "The facts of the present case suggest no exception to the general rule: plaintiff's personal gardening expenses conferred no direct benefit on decedent, and accordingly cannot be recovered in this action." (*Id*. at pp. 660-661.)

The rule stated in *Palmer* is still correct. As we recently explained in *Maglica v. Maglica* (1998) 66 Cal.App.4th 442: "The classic formulation concerning the measure of recovery in quantum meruit is found in *Palmer v. Gregg, supra,* 65 Cal.2d 657. . . . [¶] . . . [¶] The idea that one must be benefited by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery. [Citation.]" (*Maglica v. Maglica, sup*ra, 66 Cal.App.4th at pp. 449-450, italics omitted.)

In this case, the legal services rendered by C&G conferred a direct benefit on the insureds, Watercloud and LaBianco, who were the defendants in the underlying Somma litigation. And while it might be reasonable to argue that a benefit would also be conferred upon Aetna, to the extent its contractual obligation to provide that defense was fulfilled by C&G's representation of the insureds, our prior determination that Aetna owed no such duty precludes such an argument as a matter of law. In the absence of any duty by Aetna to defend the insureds, there is simply no basis to conclude that C&G's

provision of that defense somehow constituted any *direct benefit to Aetna*.[3]

Relying upon *Earhart v. William Low Co.* (1979) 25 Cal.3d 503, C&G argues that a quantum meruit recovery does not always require proof that plaintiff's services conferred a direct benefit on the defendant. But the circumstances of that case are distinguishable from this one. In *Earhart*, the plaintiff performed urgent construction services at the request of defendant, on land which defendant was in the process of purchasing. After defendant's financing fell through for purchase of the land, he refused to pay for the services, arguing that he could have no quantum meruit liability because the construction did not benefit his property. Not surprisingly, the Supreme Court rejected that theory. It explained that when defendant was the sole requestor of the services, and plaintiff relied upon defendant's promise to pay, principles of fairness supported plaintiff's recovery for the reasonable value of his labor even if those services conferred no direct benefit on defendant.

By contrast, in this case Aetna is not the sole party which requested C&G's services. Indeed, it is undisputed that C&G was actually retained by the insureds, the direct beneficiaries of the services, prior to Aetna's involvement. Thus, this case does not present the circumstances found in *Earhart*, where, in the absence of recovery from defendant, plaintiff would have no recourse at all. It was precisely those circumstances which compelled the Supreme Court to imply the equitable payment obligation against defendant.

In fact, *Earhart* actually highlights another problem with C&G's claim: quantum meruit recovery does require proof that the services in question were performed at the request of the defendant, "Indeed, when the services are rendered by the plaintiff to a third person, the courts have required that there be a specific request therefor from the

---

[3] C&G argues there was a benefit to Aetna, because the defense services protected Aetna from a claim for bad faith. However, there can be no liability for bad faith denial of insurance benefits in the absence of a duty to provide those benefits.

defendant: '[C]ompensation for a party's performance should be paid by the person whose request induced the performance.' (*Earhart v. William Low Co.* [, supra,] 25 Cal.3d 503, 515; see also *Palmer v. Gregg, supra*, 65 Cal.2d at p. 661, fn. 1.)" (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 249.)

As we said, it is undisputed that it was the insureds, Watercloud and LaBianco, who initially retained C&G in the underlying case, and there was no evidence that its services on behalf of the insureds was the result of a "specific request therefor" from Aetna. Indeed, there is no evidence that Aetna did anything more than fulfill its obligation *to the insureds*, arising out of the insurance policy, by conditionally advancing, on their behalf, the cost of defense pending determination of the coverage issue.

As explained by our Supreme Court in *Buss v. Superior Court* (1997) 16 Cal.4th 35, the insurer's duty to provide the insured with a defense extends beyond those claims actually covered by the policy, and includes the defense of claims for which there is merely the potential for coverage. But it does not obligate the insurer to provide a defense if the claims are not even potentially covered by the policy. The problem is, the issue of which claims fall within the ambit of "potential" coverage is often the subject of dispute, and the insurer's obligation to defend the insured does not allow it the luxury of delaying that defense until resolution of the coverage dispute. As *Buss* explains, "[t]o defend meaningfully, the insurer must defend immediately." (*Buss v. Superior Court, supra*, 16 Cal.4th at p. 49.)

Consequently, as happened in this case, the insurer will often fulfill its obligation to the insured by agreeing to fund the defense while simultaneously reserving its rights to seek reimbursement if it subsequently establishes that the claim(s) asserted against the insured were not potentially covered by the policy. And as the Supreme Court concluded in *Buss*, the insurer must be given the opportunity to seek such reimbursement, because otherwise the insured would be obtaining benefits under the policy (i.e., the cost of a non-covered defense) for which no premium was paid. Reimbursement is therefore

necessary to protect the parties' bargain and prevent "unjust enrichment" of the insured. (*Buss v. Superior Court, supra*, 16 Cal.4th at p. 51.)

The analysis in *Buss* makes clear that the insurer's obligation to provide the conditional defense is based upon the provisions of the insurance contract, and is owed directly *to the insured*. And in order to maintain the balance of benefits struck in the insurance contract, the insurer's duty to provide a conditional defense is counterweighed by the insured's obligation to reimburse if no coverage is found. But if the insurer's mere discharge of its obligation to the insured were used to create a separate and distinct payment obligation owed directly to a third party such as C&G — an obligation which survives even the extinguishment of the insured's own rights under the contract — that would certainly upset the contractual balance which *Buss* sought to maintain.

Moreover, as C&G vehemently argues (in the context of Aetna's cross-complaint) its receipt of Aetna's payment is not accompanied by any corresponding right of Aetna to later seek reimbursement from it, as *Buss* allows against the insured. And that is because, just as Aetna's obligations flow to its insureds, its right to retrieve the benefits conferred upon the insureds must come *from* the insureds.

Indeed, allowing the insurer to seek reimbursement from the insureds' attorneys, perhaps years after the conditional defense was initially offered, would pose an unreasonable risk for the attorneys. For example, in this case, the coverage issue was not finally resolved until after the underlying case was concluded. The fees in issue are in the hundreds of thousands of dollars. Most attorneys, up to and including fairly large law firms, do not have such funds sitting around, ready to reimburse in the event the coverage dispute does not resolve in favor of the client. An insurer's demand for reimbursement under those circumstances would bankrupt many attorneys.

The only way for the attorneys to protect themselves in such a situation would be to treat the matter like a contingency fee, and not spend any of the fees earned until the coverage issue is resolved. But the insurance defense attorney is not being paid

a larger fee – as is the contingent fee attorney – to compensate it for assuming the risk of not being paid at all. To the contrary, hourly attorney fees for insurance defense work are frequently somewhat lower than average for other hourly work, in part because insurers represent less risk of nonpayment than do other clients.

Thus we cannot endorse a rule of recovery which would allow insurers routinely to obtain reimbursement for fees paid under a reservation of rights, directly from the attorneys who earned them. In the absence of some express agreement otherwise with the attorneys, the basic right of reimbursement is against *the client* on whose behalf the money was originally paid. And as C&G points out, it was not a party to the reservation of rights agreement under which Aetna offered the conditional defense to the insureds.

In summary, to allow C&G's quantum meruit claim would result in a situation where Aetna's performance of a contractually-based obligation owed to the insureds would confer upon C&G, a non-party to the insurance contract (and with no other direct contractual relationship with the insurer), greater rights than the insureds themselves would have: C&G could continue to enforce the insured's defense obligation even *after* a court determination the obligation does not exist (which the insureds could not) and with no potential threat of reimbursement. We do not think the principles of equity and justice require such a result.

C&G argues that the imposition of a direct equitable obligation against Aetna is necessary, because C&G relied upon Aetna's agreement to pay when it continued to provide services to the insureds. But the equities here are not different from any case in which an attorney is rendering services for a client that has stopped payment.

C&G was originally retained by the insureds, and they owed C&G a direct obligation to pay for the services rendered on their behalf. Because there was no direct agreement between Aetna and C&G, Aetna's liability was secondary at best. If Aetna was not funding the insureds' defense to the satisfaction of C&G, its first recourse was to

seek the payment directly from the insureds. If the insureds were unwilling or unable to pay the fees, C&G had the same remedy as any other attorney in the circumstances: the right to withdraw from the representation. If it elected to stay in, it did so at its own risk. And even if C&G had attempted to withdraw for non-payment, but was refused permission by the court, that fact would not support a claim of reliance. A reliance claim presupposes that the complaining party would have acted differently in the absence of the promise. Participation compelled by the court is inconsistent with that theory.

Because we conclude, as a matter of law, that C&G has no right to recovery on a quantum meruit basis, and it has failed to challenge the court's rejection of liability on any other basis, Aetna is entitled to prevail on the complaint.

III

We now turn to the cross-complaint. Without belaboring the point, we agree with C&G's contention that Aetna's original cross-complaint stated no viable claim against C&G as a matter of law. In fact, although styled as motions for summary judgment, C&G's motions would be more properly viewed as motions for judgment on the pleadings. C&G's argument was that the only causes of action stated, for indemnity and contribution, were dependent upon either: (1) a direct contract between the parties imposing such an obligation; or (2) joint and several liability between the parties. And neither existed between Aetna and cross-defendants in this case.

C&G's legal analysis was correct. As the Supreme Court explained in *E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 506-507, indemnity may be either contractual or equitable: "The obligation of indemnity, which we have defined as 'the obligation resting on one party to make good a loss or damage another has incurred' [citation] may arise under the law of this state from either of two general sources. First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances. Second, it may find its source in equitable considerations brought into play either by

contractual language not specifically dealing with indemnification or by the equities of the particular case. [Citations.]"

The right to equitable indemnity depends upon the existence of joint liability owed by the indemnitee and indemnitor to some third party plaintiff. (*Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* (1990) 221 Cal.App.3d 1601, 1612.) Similarly, the right to contribution requires shared liability. (*Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 827; Civ. Code, § 1432.)

The case relied upon by Aetna, *Considine Co. v. Shadle, Hunt & Hagar* (1986) 187 Cal.App.3d 760, does not change the result. In *Considine*, the court held that a law firm may be held liable for equitable indemnity to a client when its alleged malpractice *increased* the liability owed by that client to another client also represented by the firm. However, the right of indemnity was limited to that increase, i.e., the portion of plaintiff's damages for which the client and law firm shared liability: "even where one of two tortfeasors may be solely responsible for part of a plaintiff's damages, the conduct or relationship of the tortfeasors may still permit them to share the burden of *those damages for which responsibility is shared*." (*Id*. at p. 768, italics added.)

However, while we agree that the initial causes of action pleaded in the cross-complaint were flawed, we nonetheless conclude the court erred in entering judgment in favor of the cross-defendants without even considering the merits of the motion to amend. As courts have routinely pointed out, "leave to amend must be liberally granted (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939), provided there is no statute of limitations concern, nor any prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation. (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 490.)" (*Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.)

In this case, Aetna's proposed amendment included more specific allegations supporting its claim for reimbursement, which would certainly appear to be a

valid claim against the insured, LaBianco,[4] as well as additional causes of action against C&G based upon its own alleged acts of malfeasance. None of those allegations was impacted by the merits of the summary judgment motions, which addressed only the legal viability of the indemnity and contribution theories. Consequently, the court's adjudication of those motions did not necessarily dispose of the proposed amended claims, and did not render the motion "moot."

C&G argues that the court was justified in denying the motion to amend, because it was untimely and C&G was prejudiced by the delay. However, even if such a denial might have been warranted as a reasonable exercise of the court's discretion (an issue which we need not and do not determine), that was not the court's ruling. The court dismissed the motion, without considering its merits, on the ground it was moot. Thus, the court failed to exercise its discretion at all. That was error.

The judgment is reversed, and the case is remanded to the trial court with instructions to consider the merits of Aetna's previously filed motion to amend its cross-

[4] We are less impressed with Aetna's contention that the reimbursement claim would also be valid against C&G, based upon the theory that the insureds' assignment to C&G of their rights under the insurance policy necessarily implied an assignment of liabilities as well. Those facts are not pled in the proposed amended complaint.

complaint. If that motion is granted, the case shall proceed accordingly on that cross-complaint. Aetna shall recover its costs on appeal.

_____
BEDSWORTH, J.

WE CONCUR:

_____
SILLS, P. J.

_____
ARONSON, J.